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January 25. 1771.

ANSWERS

FOR

Colonel Alexander Campbell of Barcaldine,

TO

The PETITION of Duncan Macdonald writer in Edinburgh, one of the truſtees, and factor for the other truſtee of the deceaſed Matthew Macaliſter, ſometime merchant in Edinburgh.

THE reſpondent, amongſt many others, was called in an action before this court, at the inſtance of the petitioner, concluding againſt him for payment of the ſum of L. 73 : 4 : 6⅓ Sterling, as the balance of an account of L. 133 : 4 : 6⅓ Sterling, ſaid to have been due by the reſpondent to the deceaſed Matthew Macaliſter.

The purſuer having obtained decreet in abſence, a repreſentation was preferred upon the part of the reſpondent; in which, though he acknowledged one and all of the furniſhings, yet he abſolutely denied being due the balance charged for. That he acknowledged to be reſting the ſum of L. 13, 4 s. 6⅓ d. Sterling, of which he always was, and ſtill is, willing to make inſtant payment; but that the remainder of the

account had been formerly paid by ſundry partial payments, for one of which, to the extent of L. 60 Sterling, Mr Macaliſter had neglected to give credit to the reſpondent; and that as Mr Macaliſter, for ſeveral years before his death, had been in ſuch a ſituation of mind as to have occaſioned frequent miſtakes of this kind, ſo therefore the reſpondent would be forgiven for pleading the triennial preſcription *quoad modum probationis*, the laſt article of the account ſued for being conſiderably more than three years prior to the date of this action.

This repreſentation being appointed to be anſwered, the purſuer was pleaſed to produce, alongſt with his anſwers, a letter from the reſpondent to him, of the following tenor. " *Barcaldine, November* 21. 1768. Sir, Yours of the 11th " current I have received; and ſhall be in town in February, " when I will ſettle my account with the late Mr Macaliſter, " as it cannot be done without I am on the ſpot. (Signed) " *Alexander Campbell.*"

Upon adviſing this repreſentation, with anſwers, replies, and duplies, the Lord Auchinleck Ordinary, was pleaſed to pronounce the following interlocutor. " Having conſidered this " repreſentation, anſwers, replies, and duplies, finds, That " the defender does not deny any of the articles of the ac- " count libelled on, and that his letter of the 21ſt of No- " vember 1768, bears only a promiſe to ſettle accounts; yet " as that letter bears date after the preſcription of three years " from the laſt article was run, conſequently, in ſettling the ac- " counts, the defender did not paſs from his legal exceptions; " and that the defender, when he acknowledges the furniſh- " ings, avers, that he paid L. 120 in part, and the purſuer " does not offer to redargue that allegation by the defender's " write or oath, ſuſtains the defence to the extent of L. 120: " but finds the defender liable for the balance of L. 13: 4: $6\frac{1}{2}$ " Sterling, with intereſt from the 14th February 1765, be-

" ing

"ing one year after the laſt article of the account; and de-
"cerns."

Againſt this interlocutor a repreſentation being preferred upon the part of the purſuer, the Lord Ordinary appointed the repreſentation to be anſwered, and the anſwers ſpecially to ſet forth, if, or not, Colonel Campbell, previous to writing the letter founded on, had ſeen Mr Macaliſter's account now ſued for.

In obedience to this deliverance, the reſpondent, in his anſwers, did pointedly aver, That at the time he wrote the the letter now founded on by the purſuer, he had never ſeen the account ſued for, nor did he ever ſee it till ſome time after the pronouncing of the Lord Ordinary's laſt deliverance.

Upon adviſing this repreſentation, with anſwers and replies, the Lord Ordinary was pleaſed to pronounce this judge- Aug. 4. 1770.
ment. "Having again conſidered this repreſentation, with
"anſwers and replies, and ſpecially that the defender's letters,
"promiſing to ſettle accounts, were wrote after the three
"years were expired, ſo cannot be pleaded by the purſuer to
"have occaſioned the delay of the proceſs till the preſcription
"was run; and as it is not alledged that the defender had
"ever ſeen the account purſued on, ſo that the defender,
"who admits he owes a ſmall balance to the purſuer, cannot
"be underſtood, by agreeing to ſettle accounts, to have ad-
"mitted the juſtice of this whole account, and to have paſſ-
"ed from any objections he had againſt the extent of it;
"adheres to the former interlocutor, and refuſes the deſire of
"the repreſentation."

The purſuer, not yet ſatisfied with theſe two interlocutors, which in themſelves contain moſt ſolid and unanſwerable arguments againſt a poſſibility of alteration, thought proper to bring them again under the Lord Ordinary's review, by another repreſentation; alongſt with which he produced a letter from the reſpondent Mr Macaliſter, of the following tenor,

ſo

ſo far as relates to this queſtion. "*Dalſour, January* 22. 1765.
"Sir, Be ſo good as ſend, ſo that it may be at Creiff the 6th
"February, your accounnt, as I am to ſettle my accounts
"with my agent at that time, and will ſend you caſh. Send
"by the firſt carrier to Creiff as much cloth as will make
"two ſuits of livery, with lace in proportion; alſo ſend two
"good ſilver-laced hats, and four pair good white Doncaſter
"hoſe," &c.

Upon adviſing this letter and repreſentation, the Lord Or-
Nov. 17. 1770 dinary ordained the ſame to be anſwered; and the anſwers ſpecially to obviate the argument from the defender's letter to Mr Macaliſter in 1665, before the preſcription was run; and to ſet forth ſpecially the time, manner, and place, the payments controverted are ſaid to have been made.

In obedience to this deliverance, the reſpondent, in his anſwers, having obſerved, that the letter now produced could not have the ſmalleſt effect in ſtopping the courſe of the triennial preſcription, as it was wrote no leſs than nine months before the date of the laſt article of the account ſued for: And in anſwer to the other particular contained in the Lord Ordinary's deliverance above mentioned, the reſpondent did condeſcend, and ſay, that he pointedly remembers the payment that is now controverted by the purſuer, to have been made by him to Matthew Macaliſter himſelf at Edinburgh, in the month of November or December 1765; and that the reſpondent had a moſt diſtinct remembrance of this fact, from the following circumſtance, viz. that part of the money paid at this time to Matthew Macaliſter, he got from his agent at Edinburgh, for a draught on Mr Henry Davidſon at London.

The Lord Ordinary being ſatisfied relative to theſe particulars, he, upon adviſing this repreſentation and anſwers, was
Dec. 15. 1770. pleaſed to pronounce this interlocutor. "Having again con-
"ſidered this repreſentation, with the anſwers, and that the
"letters

" letters now founded on by the purſuer by the defender to " the deceaſed Mr Macaliſter in the 1765, which, while " commiſſioning certain goods therein mentioned, likewiſe " deſires him to ſend his account, telling him, he was to " get caſh, and therefore deſires the account to be ſent in a " few days after, is not ſufficient to make the claim laſt for " forty years; but that the ſame not having been ſued for " within three years of the laſt article, is now only to be " aſcertained by the defender's writ or oath; and therefore " adheres to the former interlocutor, and refuſes the deſire of " the repreſentation."

Theſe interlocutors the petitioner has thought proper to bring under your Lordſhips review, by petition; which your Lordſhips having ordained to be anſwered, what follows is humbly offered on the part of the reſpondent; who having already ſo fully ſtated the facts and previous ſteps of procedure which gave riſe to this queſtion, and having at length recited the judgements of the Lord Ordinary, which moſt diſtinctly ſet forth the grounds upon which they proceed, and in themſelves contain arguments in ſupport of the deciſions there given, which have by no means been anſwered in the petition; ſo therefore it will be altogether unneceſſary for the reſpondent to trouble your Lordſhips with many words upon this point.

The plea of preſcription, in itſelf ſo far from being an odious one, (as ſtated in the petition), is, on the contrary, founded on natural equity alone, and is the cardinal ſecurity to mankind againſt perpetual claims, and eternal lawſuits.

The reſpondent, however, in the preſent caſe, would have had no occaſion to reſort to this plea of preſcription, had it not been for Mr Macaliſter's unfortunate ſituation for ſeveral years before his death, which made him moſt irregular in keeping of his accounts, and frequently apt to neglect giving

credit for payments that had been made him. And in evidence of this averment, the reſpondent, (if proper or competent), need only appeal to the *perſonal* experience of one of Mr Macaliſter's truſtees, the gentleman who ſigns the petition, who well knows that this is not the firſt of ſeveral inſtances where Mr Macaliſter's demands have been paid, by the production of either his own receipt, or diſcharged account.

The petitioner, in his argument on the import of the act 1579, introducing triennial preſcriptions, has proceeded altogether upon a miſapprehenſion of the import of that act, which is by no means founded upon the preſumption, that a debt was never due, becauſe not demanded within a certain time; but, on the contrary, it proceeds upon this preſumption, that a debt, though once juſtly due, has been already paid, if the creditor ſhall not demand payment thereof during the ſpace of three years from the date of the laſt article of contraction. As it cannot be ſuppoſed, that debts of this kind will be allowed to lie over for more than three years, without either bringing an action for payment, or elſe obtaining a written ſecurity therefor from the debtor; hence it follows, that if the three years ſhall be allowed to elapſe, the preſumption of payment becomes *præſumptio juris, et de jure, et lex ſtatuit ſuper præſumpto*, ſo far as relates to the mean of proof.

As to the reſpondent's letters, founded on by the petitioner, the one of date 22d January 1765, while the account was current, and the other of date the 21ſt November 1768, long after the triennial preſcription was run, the Lord Ordinary's interlocutors already recited have given ſuch ſatisfactory and convincing reaſons why theſe letters ſhould have no influence on the preſent queſtion, that it would be altogether improper for the reſpondent to ſay one word more on that head.

It only, therefore, remains with the reſpondent to take notice of the two deciſions mentioned in the petition, in ſupport of the plea maintained by the purſuer.

As to the firſt caſe, Dickſon *contra* Macaulay, the reſpondent does humbly apprehend, that it differs *toto cælo* from the preſent diſpute. For there the queſtion was not as to the payment of a merchant's open account, or how ſoon that account ſhould preſcribe *quoad modum probandi*; but the caſe ſtood ſimply thus: One Cockburn, who was neither a merchant, nor a perſon who kept boarders, upon a letter of credit from one Macaulay, promiſing repayment of what he ſhould lay out on his wife's account, had, in conſequence thereof, entertained her in his houſe, and laid out ſundry different ſums of money upon her behoof; for all which Cockburn's executrix brought an action for payment more than three years after the date of the outlay.—There the court moſt properly found, That as the lady had been entertained, and the money advanced for her upon the faith of this letter of credit alone, in the ſame way as if it had been a bill, bond, or promiſſory note, ſo therefore this demand could not fall under the triennial preſcription of merchants accounts, &c. and conſequently action fell to be ſuſtained thereon, even after the lapſe of three years.

In the preſent caſe, however, the action for payment is brought upon the evidence of a merchant's books alone, and that too for furniſhings in the way of his buſineſs, which it is not to be ſuppoſed that he would have allowed to lie over unpaid, or at leaſt undemanded, for more than the ſpace of three years after his cuſtomer had ceaſed to take any furniſhings from him.

As to the other deciſion mentioned by the petitioner, viz. that of Elliot *contra* Veitch, neither can it in any degree apply to the caſe in queſtion. For, *imo*, There the debtor himſelf in the account was dead, ſo that his oath could not be

obtained

obtained in order to aſcertain the account ſtill reſting. 2*do*, His repreſentatives, who were defenders in that action, did not pretend to ſay, that any part of the account fued for had been paid, and that the defunct's letter, founded on, related to a balance ſtill reſting; ſo that the letter acknowledging a debt to be due, muſt neceſſarily relate to the whole account, and not to any balance thereof. In the preſent caſe, however, the debtor is ſtill alive, and willing to give his oath; and, 2*dly*, There is an acknowledged balance due, to which, and to which alone, his letter promiſing to ſettle accounts does relate.

Upon the whole, therefore, the reſpondent can entertain no doubt that your Lordſhips will refuſe the deſire of the petition, and adhere to the Lord Ordinary's interlocutors complained of.

In reſpect whereof, &c.

WALTER CAMPBELL.